admit, this Court has clearly held that the inclusion of an express preemption clause "does not bar the ordinary workings of conflict preemption." *Id.* (citing *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000)). In *Geier* the Court explicitly foreclosed the possibility, left open in *Freightliner*, that the presence of an express preemption clause could justify an inference or "special burden" against preemption by agency rules. *Geier*, 529 U.S. at 873.

4. Respondents also cannot explain away the conflict between the Fourth and the Seventh Circuits over the scope of express statutory preemption. *See Bastien v. AT&T Wireless Servs. Inc.*, 205 F.3d 983 (7th Cir. 2000). Respondents attempt to distinguish *Bastien* on the grounds that the Court is obligated to assume the truth of Respondents' factual allegations in deciding Petitioners' motion to dismiss, and that these factual allegations would allow the Respondents to show that Petitioners are "active participants in the market and are providing wireless service." Opp. 28.[3] As a result, Respondents contend, "[i]t is not 'entry' regulation to subject [Petitioners'] post-entry activities to the lawful exercise of police powers and to judicial scrutiny under general law providing remedies for wireless phone consumers." *Id.* This is sheer sophistry. Section 332(c)(3)(A)'s prohibition of "entry regulation" excludes a

3. Respondents also attempt to avoid the conflict between *Bastien* and the decision below by falling back on the completely contrived distinction between portable and fixed transmitters, a contrivance that runs through the Fourth Circuit's analysis. Opp. 22. As explained in the Petition, this dichotomy is contrary to the FCC's own understanding and regulations, and contrary to technological reality. Pet. 29-30. The deployment and placement of wireless base stations and their signal strength simply cannot be divorced from the design and signal strength of the wireless handsets that interact with them. Once this fiction is stripped away, it becomes clear that *Bastien* stands for the proposition that technical aspects of network design fall within an "exclusively federal" sphere and that *Pinney* rejects that conclusion. *See also* CTIA Br. 3, 8.

substantive category of regulatory mandates from state authority – it denies the state "any authority" to impose such regulation on new entrants *or* existing carriers. In *Bastien* itself the defendant wireless service provider had already entered the market, and was confronting "judicial scrutiny under general law providing remedies for wireless phone consumers," Opp. 28, in the form of a suit alleging that it had violated state contracts laws by misrepresenting the capabilities of its network. *See Bastien*, 205 F.3d at 985.

Respondents attempt to blunt the holding of *Bastien* by citing two FCC decisions that relate to "other terms and conditions," 47 U.S.C. § 332(c)(3)(A), of wireless service. *See* Opp. 29. But these decisions do not involve technical mandates for equipment design, which the FCC has found to be clear examples of prohibited entry regulation. Pet. 29 (citing *Petition on Behalf of the State of Haw.*, 10 F.C.C.R. 7872, 7883, ¶ 57 n.120 (1995)).

II. THE OPPOSITION'S ATTEMPT TO DEFEND THE DECISION BELOW ON THE MERITS FAILS.

1. Respondents falsely contend that the FCC's authority to enact RF regulations stems from Section 704(a) of the 1996 Act. Opp. 18-19. In fact, exclusive federal control over every technical aspect of radio regulation dates back to 1927, and exclusive authority over radio was given to the FCC upon the agency's creation in 1934.[4] Pet. 5. Title III of the Communications Act plainly empowers the Commission to adopt rules pertaining to every aspect of radio transmissions, including RF emissions generally and the health and safety effects of those emissions specifically. *Id.* at 9-10; CTIA Br. 4-

4. Because the Commission's authority over RF predates the enactment of the 1996 Act by more than 60 years, the Respondents' extensive reliance on Section 601(c) of the 1996 Act is misplaced. Opp. 23. Even if this savings clause could be interpreted to limit agency conflict preemption, which it cannot, *see Geier*, 529 U.S. at 869, it only pertains to the provisions of the 1996 Act itself.

6. When the FCC enacted its first RF emissions guidelines in 1985, 11 years prior to the enactment of Section 704(a), it relied upon its general regulatory authority under the Communications Act in order to do so. Pet. 9-10. Contrary to Respondents' suggestion, Opp. 3, 20, the decision to exclude certain facilities from this first set of guidelines was based on reasoned analysis, *not* a lack of authority. Nowhere in its 1985 Order did the FCC express doubt about its ability to apply RF requirements to any and every service regulated by the Commission. *Biological Effects of Radiofrequency Radiation*, 100 F.C.C.2d 543 (1985).

Respondents' attempt to turn the express preemption of certain local zoning rules in the 1996 Act into a *limitation* on Commission authority to adopt broadly preemptive rules is specious. Section 332(c)(7), entitled "Preservation of Local Zoning Authority," was designed to preserve certain limited state authority in the face of pervasive federal regulation. It is a specific example of Congressional concern over state and local laws intruding into the design and operation of the wireless network. *See* CTIA Br. 14-15. It is not, as Respondents would have it, Opp. 22, an implicit rejection of the exclusivity of federal regulation in the face of competing state regulation other than zoning laws.

Section 704(b), in contrast, is a targeted command for the FCC to complete its rulemaking in a specified docket and "prescribe and make effective rules regarding the environmental effects of radio frequency emissions." App. 135a. The Notice of Proposed Rulemaking in the docket cited by Section 704(b), which initiated the rulemaking that the FCC was directed to complete within 180 days, applied to radio emissions from *all* FCC regulated services. *See Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, 8 F.C.C.R. at 2849, ¶ 1 (noting that "[t]his proposal could affect a wide variety of radio services, e.g., AM, FM, and TV broadcast services; *common-carrier land-mobile services*; and private-radio land-mobile services")(emphasis added). By citing this

specific docket number, Congress clearly understood that it was requiring the FCC to promulgate RF standards for *all* regulated services, including cellular telephony.

2. Respondents' attempt to minimize the conflict between their suit and federal regulations by recasting their claims must fail. First, to sustain a redhibition claim under Louisiana law, there must be "defects, or vices, in the thing sold." La. Civ. Code art. 2520. This is an implied warranty, written into every contract in Louisiana by operation of statute. *See, e.g., Young v. Ford Motor Co.*, 595 So. 2d 1123, 1127 (La. 1992). Thus, Respondents' claim that "redhibition does not impose a state law requirement" is simply false. Opp. 15. Second, as the Respondents admit, their "express warranty and contract claims" are "predicated on state-law duties *not to conceal material facts* and not to conspire *to commit fraud*." Opp. 15 (emphasis added).[5] The Seventh Circuit found that similar breach of contract and fraud claims were preempted by the FCC's comprehensive regulation of network design and coverage. *Bastien*, 205 F.3d at 986. Absent a finding that cellular telephones are defective or pose a danger to their users, there is no redhibition claim, no "material fact" to conceal, and no "fraud" to commit.

III. THIS CASE SQUARELY PRESENTS THE LEGAL ISSUES RAISED BY THE PETITION.

1. Respondents' assertion that Petitioners "never argued agency conflict preemption . . . nor discussed it in the

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5. Respondents' Magnuson-Moss claims, Opp. 13-14, are derivative of state law warranty claims. *See, e.g., Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1011 (D.C. Cir. 1986) ("Under the terms of Magnuson-Moss, state law governs the existence and basic meaning of implied warranties."); *see also* 15 U.S.C. § 2301(7) ("[t]he term 'implied warranty' means an implied warranty *arising under State law* . . . in connection with the sale by a supplier of a consumer product") (emphasis added). Preemption of inconsistent state law will thus also resolve the Magnuson-Moss claims.

proceedings below," Opp. 17, is preposterous. Petitioners argued extensively below that the Respondents' claims were preempted by agency action, as well as by the plain text of the statute. *See* Appellee's Br. 39-42, *Pinney v. Nokia*, No. 03-1433 (4th Cir. Oct. 3, 2003) (citing *Geier*, 529 U.S. at 881; *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984)). Moreover, the District Court relied heavily on action by the FCC and FDA in determining that Respondents' suit was barred by implied conflict preemption, App. 64a-72a, and distinguished its decision from an earlier opinion in the Eastern District of Louisiana, in part, on the grounds that the earlier opinion was based solely on the Communications Act and did not consider "numerous FCC regulations." *Id.* at 64a.

2. Respondents' claim that there are "finality" problems that arise from the posture of this case, Opp. 13-14, is equally meritless. Resolution of the preemption issue would dispose of the entire case. As set forth above, all of Respondents' claims stand or fall on the question whether cellular telephones may be judged unsafe or defective under state law despite their compliance with FCC rules. Where resolution of an issue is "fundamental to the further conduct of the case," review of that issue by this Court is proper. *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947); *see also United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). Respondents' own concession that the "trier-of-fact [is] free to decide in favor of the Petitioners on any permissible ground *other than preemption*," Opp. 13 (emphasis added), highlights that the question of preemption is a pure question of law that will not be illuminated by further proceedings below.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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